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No. 80-2189

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAJOR BECTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners claim that they should be allowed to take an immediate appeal from the district court's denial of their motion to dismiss the indictment on double jeopardy grounds after the jury at their first trial was unable to reach a verdict.

1. Petitioners were named in a three-count indictment charging them with conspiracy to import marijuana, in violation of 21 U.S.C. 960 (count one); conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (count two); and possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (count three). At the close of the government's case, the district court granted petitioners' motion for a judgment of acquittal on count one, but denied the motion as to the other two counts. When the jury was unable to reach a

verdict, the district court granted a mistrial. The court subsequently denied petitioners' renewed motions for a judgment of acquittal (Pet. 2-3).

When the case was set for retrial, petitioners moved to dismiss the indictment on double jeopardy grounds, claiming that the evidence adduced by the government was legally insufficient and that the district court erred when it denied their motions for a judgment of acquittal. The district court concluded that the evidence was sufficient and denied petitioners' motions. After the dismissal motions were denied, petitioners attempted to take an interlocutory appeal to the court of appeals (Pet. App. A-2 to A-3).

The court of appeals dismissed the appeal (Pet. App. A-1 to A-6). The court noted that, when a mistrial is ordered and the case is set for retrial, the evidence presented to the jury has not been found to be legally insufficient by the district court. Accordingly, there is no determination of evidentiary insufficiency that would bar a retrial. The court of appeals also observed that petitioners' appeals were in substance appeals from the denial of their motions to acquit during their first trial (Pet. App. A-3 to A-4). Such a denial, the court noted, is not immediately appealable under *Abney* v. *United States*, 431 U.S. 651 (1977). Instead, motions to acquit are "just * * * steps toward [the] final disposition" of the case and denials of such motions do not satisfy the requirements for interlocutory review (Pet. App. A-6).

2. Petitioners contend (Pet. 4-12) that, under *Abney* v. *United States*, *supra*, they were entitled to immediate appellate review of the district court's pretrial ruling denying their motion to dismiss the indictment. According to their submission, *Abney* requires the court of appeals to decide, before any retrial, whether the evidence presented by the government during the first trial was legally sufficient to sustain a conviction. In the absence of such a determination, petitioners claim, they may not be retried consistent

with this Court's decision in *Burks* v. *United States*, 437 U.S. 1 (1978). For the reasons set forth in the opinion of the court of appeals (Pet. App. A-2 to A-6), on which we generally rely, petitioners' claim is without merit.

In *Abney*, this Court determined that a double jeopardy claim was reviewable on an interlocutory basis. The defendants in *Abney* asserted that, because the original indictment against them had been "duplicitous" and the jury had returned a general verdict of guilty, the jury may have acquitted them on one of the charges contained in the duplicitous indictment while convicting them on the other. They contended that the Double Jeopardy Clause barred their retrial following reversal of their conviction on appeal, in light of this possible "acquittal" by the jury. 431 U.S. at 664.

Abney concluded that this double jeopardy claim was "collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court emphasized that the "defendant makes no challenge whatsoever to the merits of the charge against him" (*ibid.*). It also observed that the "elements of [the double jeopardy] claim are completely independent of his guilt or innocence" (*id.* at 660). Since the order challenged on appeal was completely "collateral" to the issue of guilt or innocence, and since effective relief could not be afforded on review following final judgment after retrial, the Court approved immediate review.

Abney also held, however, that other claims asserted by the defendant could not be appealed on an interlocutory basis. In particular, this Court rejected the assertion that a defendant in a criminal case is entitled to interlocutory review of a pretrial order sustaining the indictment (*id.* at 663):

> [A]n order denying a motion to dismiss an indictment for failure to state an offense is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial.[1]

The decision of the district court in this case, ruling that the government had presented sufficient evidence to justify a finding of guilt, is a classic example of a pretrial order that "goes to the very heart of the issues to be resolved at * * * trial." Rather than being "completely independent of [the issue of] guilt or innocence," the challenged order relates directly and exclusively to the merits of the prosecution. As the Fifth Circuit recently explained in *United States* v. *Rey*, 641 F. 2d 222, 225 (1981):

> These * * * claims of insufficient evidence * * * cannot be resolved in this appeal. "Although in form the question presented here is that of denial of a motion asserting double jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial." * * *
>
> Denials of motions to acquit are not interlocutorily appealable because, being nothing more than a motion for directed verdict, they are not collateral to the merits but are instead "precisely directed" to them. * * * The second element of the collateral order test is thus not met.

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[1] *Abney* thus reaffirmed the well established rule that a pretrial order that does not meet the standards of a "collateral order," as prescribed in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), is not subject to an immediate appeal. This is true even though reversal of the order on appeal would obviate the need for a trial. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 860 & n.7 (1978); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940). Immediate review is not available to test claims that are "enmeshed in the factual and legal issues" to be resolved during the trial on the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 9.

On this basis, the courts of appeals repeatedly have concluded that a "denial of a motion for acquittal is not a final, appealable decision [under *Abney*] even when made after a hung jury mistrial." *United States* v. *Carnes*, 618 F. 2d 68, 70 (9th Cir.), cert. denied, 447 U.S. 929 (1980); accord, *United States* v. *Ellis*, 646 F. 2d 132, 134-135 (4th Cir. 1981); *United States* v. *Young*, 544 F. 2d 415, 416 (9th Cir.), cert. denied, 429 U.S. 1024 (1976). In light of these precedents, the court below correctly dismissed petitioners' appeal from the district court's denial of their motions to dismiss the indictment.[2]

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[2]Petitioners rely on two cases that allowed interlocutory appeals following reversals of convictions. See *United States* v. *United States Gypsum Co.*, 600 F. 2d 414 (3d Cir. 1979); *United States* v. *Jelsma*, 630 F. 2d 778 (10th Cir. 1980). Those cases, however, did not address the mistrial situation presented here. In both cases, the appeals followed closely in the wake of a remand from the court of appeals and after a final judgment of conviction in the district court. Although we question whether those cases were correctly decided, we note that, in those cases, the courts of appeals were in a position to limit the disruption caused by interlocutory review by considering the sufficiency of evidence issue during the first appeal. In the mistrial setting, by contrast, the sufficiency issue will never arise before the court of appeals in conjunction with an appeal from a final judgment. Recognizing a right to interlocutory review of the sufficiency issue in the mistrial context would thus lead to "piece-meal appeals with a vengeance," as the court of appeals warned (Pet. App. A-5). See also *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 6, noting that the collateral order doctrine applies only to a "small class" of interlocutory orders, and is a "narrow exception" to the final judgment rule.

If interlocutory appeals were permitted in cases of this kind, the delay introduced in criminal prosecutions would be substantial. In the present case, thirteen months already have elapsed since the district court declared a mistrial and set the case for retrial. Still more time will elapse before this Court can act on the petition for certiorari. Petitioners' attempted interlocutory appeal has thus resulted in substantial disruption of the proceedings in the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[3]

LAWRENCE G. WALLACE
Acting Solicitor General

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[3]This Court recently has denied certiorari in two cases raising the same issue. See *Kuhn* v. *United States*, cert. denied, No. 80-1715 (June 8, 1981); *Hanigan* v. *United States*, cert. denied, No. 80-1165 (Mar. 9, 1981).

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